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No. 09-439

IN THE
Supreme Court of the United States

QSI HOLDINGS, INC. AND QUALITY STORES, INC.,
Petitioners,

v.

DENNIS E. ALFORD, JOAN R. GOWELL, TED G. BRITTON, JERRY L. HAMSTRA, LORI L. BREWER, RUSSELL H. HARTMAN, ROBERT D. RICHTER, MARY L. HILT, TIMOTHY D. MCLAUGHLIN, ROGER B. ROSENFELD, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Although a bankruptcy trustee may usually set aside pre-petition payments that violate state laws concerning fraudulent transfers, 11 U.S.C. § 546(e) carves out an exemption that prevents the bankruptcy trustee from setting aside any "settlement payment . . . made by or to . . . a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency," unless the payment is an "actual" fraudulent transfer and not merely a "constructive" one.

The questions presented in this case are:

1. Whether, despite the lack of such a requirement in the statutory text, 15 U.S.C. § 546(e) should be limited to apply only to settlement payments made by or to a financial institution that acquires a beneficial ownership interest in the funds.

2. Whether, despite the lack of such a requirement in the statutory text, 15 U.S.C. § 546(e) should be limited to apply only to settlement payments made in connection with publicly traded securities and not settlement payments made in connection with privately traded ones.

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STATEMENT

Respondents are former shareholders of a privately held company called Quality Stores, Inc. ("Quality Stores"), which, in the late 1990s, operated a chain of retail stores servicing the customer niche of part-time and hobby farmers and homeowners who enjoy country living, gardening, and do-it-yourself projects. Pet. App. 40a. In 1999, a similar but larger retail chain named Central Tractor Farm & Country, Inc. ("Central Tractor") and its parent company, CT Holdings, acquired Quality Stores in a leveraged buyout as part of a statutory merger under the laws of Delaware. *Id.* When the merger closed, Central Tractor emerged with the name Quality Stores, Inc. and its parent company adopted the name QSI Holdings, Inc. *Id.*

Central Tractor and CT Holdings paid a total purchase price of $208 million to acquire Quality Stores. Of that amount, $111.5 million was paid in cash and the balance was paid with $91.8 million in CT Holdings stock. *Id.* at 40a-41a. As part of the merger agreement, the shareholders of the "old" Quality Stores could trade in their stock in exchange for cash, for shares in the new QSI Holdings, or for a combination of both. *Id.* at 41a. At the time of the merger, Quality Stores' stock was held both by 260 individual shareholders and by Quality's Employee Stock Ownership Trust ("ESOT"), managed by LaSalle Bank. *Id.*; 6th Cir. JA 177-84. The ESOT consisted of 246 participants, many of whom were lesser paid and mid-level Quality employees. Pet. App. 41a; 6th Cir. JA 187-91. On behalf of the ESOT, LaSalle Bank elected to exchange all of the

employees' shares for $60.7 million in cash, rather than for shares in the new QSI Holdings. Pet. App. 41a; 6th Cir. JA 182.

Central Tractor tendered the cash payments by wire transfer to an account at HSBC Bank USA ("HSBC") pursuant to an agency exchange agreement between Central Tractor and HSBC. Pet. App. 41a. HSBC invested those funds in government guaranteed investments of its choice. HSBC then collected the stock from the shareholders of the former Quality Stores and disbursed payments by wire transfer or check from HSBC's own account to the former shareholders and to LaSalle Bank as Trustee of the ESOT. LaSalle Bank thereafter disbursed those funds to the ESOT participants. *Id.* In order to finance the merger and acquisition, the assets of the former Quality Stores and Central Tractor were both pledged as collateral. *Id.* at 40a.

The new Quality Stores that emerged from the merger remained in business until October 2001, when creditors filed an involuntary petition for bankruptcy. *Id.* at 42a. On October 31, 2003 – two years after the involuntary bankruptcy petition and four years after the merger transaction closed – Quality Stores, Inc. and QSI Holdings, Inc. initiated an adversary proceeding against approximately 170 shareholders of the old Quality Stores company, many of whom had owned stock through the ESOT. *Id.* at 39a, 47a. The adversary proceeding sought to set aside the $111.5 million paid to the shareholders as part of the leveraged buyout. *Id.* at 40a, 42a. It alleged that those payments were made in exchange

for less than equivalent value and therefore constituted "constructive fraudulent transfers" under the Uniform Fraudulent Transfer Act as adopted by the State of Michigan. Mich. Comp. Laws Ann. §§ 566.31 *et seq.*; Pet. App. 42a-43a. The adversary complaint did not allege that the payments were "actual fraudulent transfers," which would have required Petitioners to show that the payments were made with the actual intent to hinder, delay, or defraud the companies' creditors. Pet. App. 42a.

In seeking to set aside the payments made to former shareholders, Petitioners relied on 11 U.S.C. § 544(b), which authorizes bankruptcy trustees to "avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law," including state laws concerning fraudulent transfers. 11 U.S.C. § 544(b). But a different section of the Bankruptcy Code, 11 U.S.C. § 546(e), carves out an exemption to section 544(b) and prevents bankruptcy trustees from setting aside any "settlement payment . . . made by or to . . . a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency . . . that is made before the commencement of the cases," unless the payment was made with the "actual intent to hinder, delay, or defraud" creditors. 11 U.S.C. §§ 546(e), 548(a)(1)(A). The Bankruptcy Code broadly defines the term "settlement payment" as "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement

payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8).

Relying on the express statutory exemption for settlement payments made by or to a financial institution, Respondents and several other former shareholders of the old Quality Stores filed motions for summary judgment and dismissal of the adversary complaint. Pet. App. 42a. Respondents argued that because the payments they received through the leveraged buyout were (a) settlement payments commonly used in the securities trade and (b) made by and to HSBC, the payments were protected by 11 U.S.C. § 546(e) and could not be set aside as constructive fraudulent transfers. Pet. App. 25a-26a, 42a-43a.

The Bankruptcy Court granted Respondents' motions for summary judgment and dismissal on October 26, 2006. Pet. App. 50a. The United States District Court for the Western District of Michigan affirmed the Bankruptcy Court's decision on December 21, 2007, *id.* at 35a, and a unanimous panel of the United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision on July 6, 2009, *id.* at 3a, 13a.

REASONS FOR DENYING THE PETITION

In an effort to obtain this Court's review of claims that have been rejected by all three of the courts below, Petitioners argue that their adversary complaint raises two questions concerning the proper interpretation of 11 U.S.C. § 546(e) that have divided the lower courts: (1) whether section 546(e) applies to settlement payments transferred to or from a

financial institution when the financial institution does not obtain a beneficial interest over the funds; and (2) whether section 546(e) applies to settlement payments made in connection with privately traded securities. Pet. at i. But an examination of the purported divisions among the lower courts reveals that any disagreement with respect to the first question involves a single outlier circuit court decision that is stale and unlikely to be followed, and any disagreement with respect to the second question does not exist at the circuit court level at all – every circuit court decision has been consistent in rejecting Petitioners' suggested interpretation of the statute. Both questions can and will be resolved without this Court's intervention.

In concluding that the payments made to former Quality Store shareholders via HSBC are protected from being avoided whether or not HSBC acquired a beneficial interest in the funds, the Sixth Circuit adopted the consensus position of nearly every court to consider the issue. *See Lowenschuss v. Resorts Int'l, Inc.* (*In re Resorts Int'l Inc.*), 181 F.3d 505, 516 (3d Cir. 1999); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 987 (8th Cir. 2009). The only support Petitioners cite for their contrary view is a 13 year-old decision issued by a divided panel of the Eleventh Circuit in *Munford v. Valuation Research Corp.* (*In re Munford, Inc.*), 98 F.3d 604 (11th Cir. 1996). No other Court of Appeals has embraced the analysis of the *Munford* majority. Indeed, in rejecting Petitioners' arguments, the Sixth Circuit joined the Third and Eighth Circuits in criticizing *Munford* as lacking any foundation in the statutory text. *See*

Resorts Int'l, 181 F.3d at 516; *Contemporary Indus.*, 564 F.3d at 987. In the 13 years since *Munford* was decided, the Eleventh Circuit has never applied its holding to another case (or even cited to the holding approvingly) and has not had the opportunity to revisit the case following *Munford's* unanimous rejection by every other circuit court to consider the issue. Any "circuit split" created by *Munford* lacks substance, is stale, and can easily be cleared up by the Eleventh Circuit *en banc* without using this Court's scarce resources.

As Petitioners concede, the Courts of Appeals are not divided with respect to the second question presented. *See* Pet. at 18. The Sixth and Eighth Circuits are the only Courts of Appeals to address the issue, and both courts hold that 11 U.S.C. § 546(e) protects privately traded securities as well as publicly traded ones. *See Contemporary Indus.*, 564 F.3d at 986; Pet. App. 10a-11a. The contrary cases cited by Petitioners are all from district courts and bankruptcy courts. The conflict that exists among these lower courts likely will be resolved as other circuit courts address the issue. If not, and an entrenched circuit split emerges, the Court can grant review of this narrow issue at that time. In accordance with its usual practices, the Court should wait until it is clear that review is necessary before granting a writ of certiorari.

For these reasons the petition should be denied.

I. The Purported Division Among The Circuits With Respect To The First Question Presented Is Stale And Likely Will Resolve Itself.

The Third, Sixth, and Eight Circuits all have held that 11 U.S.C. § 546(e) does not require that a financial institution must have had a beneficial interest in settlement funds in order for those funds to be exempt from constructive fraudulent transfers. *See Resorts Int'l*, 181 F.3d at 516; *Contemporary Indus.*, 564 F.3d at 987; Pet App. 13a. As each of these courts has noted, the statutory text applies to all settlement payments "made by or to a . . . financial institution" and does not contain any requirement that the financial institution obtain a beneficial interest in the funds. *See Resorts Int'l*, 181 F.3d at 516; *Contemporary Indus.*, 564 F.3d at 988; Pet App. 13a. Earlier cases dealing with the application of § 546(e) did not apply or even discuss this issue. *See, e.g., Kaiser Steel Corp. v. Charles Schwab & Co. ("Kaiser I")*, 913 F.2d 846, 848 (10th Cir. 1990); *Kaiser Steel Corp. v. Pearl Brewing Co. ("Kaiser II")*, 952 F.2d 1230, 1239-40 (10th Cir. 1991).

That conclusion is reinforced by the Bankruptcy Code's definition of the term "transfer," which is expressly defined as "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with (i) property; or (ii) an interest in property." 11 U.S.C. § 101(54). Under this broad definition, even the mere transfer of possession without a transfer in beneficial ownership constitutes a "transfer" for purposes of the

Bankruptcy Code. As the Ninth Circuit has explained:

> The definition of transfer is as broad as possible. . . . Under this definition, any transfer of an interest in property is a transfer, including a transfer of possession, custody, or control even if there is no transfer of title, because possession, custody, and control are interests in property.

Bernard v. Sheaffer (*In re Bernard*), 96 F.3d 1279, 1282 (9th Cir. 1996); *see also Besing v. Hawthorne* (*In re Besing*), 981 F.2d 1488, 1492 (5th Cir. 1993) ("[T]he Code's expansive definition literally encompasses 'every mode of . . . parting with an interest in property.'" (citation omitted; alterations in original)).

In reaching a contrary conclusion, a divided panel of the Eleventh Circuit in *Munford* held, sua sponte and without any briefing on the issue, that 11 U.S.C. § 546(e) implicitly requires that the financial institution must have obtained a beneficial interest in the transferred funds, even though no such requirement is apparent from the statutory text. *Munford*, 98 F.3d at 610. The *Munford* majority justified its decision by invoking the "mere conduit doctrine" developed in the context of 11 U.S.C. § 550. That doctrine holds that a conduit is not liable for repaying an avoided transfer if the conduit immediately passes the transfer to its ultimate recipient and never obtains ownership over the funds. But the *Munford* majority never explained why a doctrine developed in the context of section

550 as a shield to insulate financial institutions from liability for avoided transfers should be imported into section 546(e) and used as a sword to recover transfers that would otherwise be immune from avoidance. As Chief Judge Hatchett noted in dissent, "rather than require Munford, Inc. to prove 'actual intent to hinder, delay or defraud' its creditors, [the majority] chose to disregard the plain language of section 546(e) in order to create a new exception to its application." *Munford*, 98 F.3d at 614 (Hatchett, J., concurring in part and dissenting in part).

Every Court of Appeals to address the issue since *Munford* was decided has been unanimous in rejecting the divided panel's reasoning. Even the Eleventh Circuit has never cited the holding approvingly. Rather than spending time and resources reviewing this narrow issue, this Court should allow the Eleventh Circuit the opportunity to reexamine the issue in light of the positions taken by its sister circuit courts. Indeed, the Eleventh Circuit repeatedly has demonstrated its willingness to correct its past positions *en banc* when those decisions have proved to be outliers or the targets of cogent criticism. *See, e.g.*, *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009) (en banc) (overruling previous decision in *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996), based on criticism from other circuits); *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 543-44 (11th Cir. 2002) (en banc) (overruling previous decision in *Bank v. Pitt*, 928 F.2d 1108 (11th Cir. 1991), to bring "our circuit in line with the majority of our sister circuits").

In light of the age of the *Munford* opinion, its unanimous criticism by other circuits, and the lack of any more recent decisions in the Eleventh Circuit adhering to *Munford*, there is no reason to think that there is a live disagreement among the circuits warranting this Court's review. In the unlikely event that the Eleventh Circuit adheres to *Munford*'s reasoning in the future, this Court will have an opportunity to review the issue at that juncture.

II. Absent A Circuit Split, The Disagreement Among District Courts With Respect To The Second Question Presented Does Not Merit This Court's Review.

Four Courts of Appeals have held that 11 U.S.C. § 546(e) immunizes settlement payments made in connection with a leveraged buyout from being set aside as constructive fraudulent transfers. *See Kaiser I,* 913 F.2d at 848; *Kaiser II,* 952 F.2d at 1239-40; *Resorts Int'l,* 181 F.3d at 515-16; *Contemporary Indus.*, 564 F.3d at 986; Pet. App. 10a-11a; *see also Munford,* 98 F.3d at 610 (assuming that section 546(e) applies but not deciding the issue). The Eighth and Sixth Circuits have further held, in accordance with the plain meaning of the statutory text, that section 546(e) applies regardless of whether the securities are publicly or privately traded. As the Eighth Circuit explained: "Nothing in the relevant statutory language suggests Congress intended to exclude these payments from the statutory definition of 'settlement payment' simply because the stock at issue was privately held." *Contemporary Indus.*, 564 F.3d at 986. The Sixth

Circuit similarly found that "nothing in the text of § 546(e) precludes its application to settlement payments involving privately held securities." Pet. App. 11a.[1]

Despite the admitted absence of a circuit split, Petitioners nonetheless ask this Court to grant certiorari based on a disagreement among some district courts and bankruptcy courts regarding the scope of section 546(e). But this Court usually grants certiorari only when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10. As more Courts of Appeals address this issue, those lower-court conflicts likely will be resolved without this Court's intervention. Until there is a disagreement among the circuit courts, there is no reason for this Court to expend its resources reaching out to resolve this narrow issue.

Citing to only six cases, Petitioners assert that this Court has "frequently granted certiorari" where

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[1] Significantly, although the stock acquired in *Kaiser II* and *Resorts Int'l* was publicly held, the stock was not exchanged over a public securities exchange. *See Kaiser II*, 952 F.2d at 1235 (stock held at securities clearing agency acting as a depository, which tendered shares to Bank of America); *Resorts Int'l*, 181 F.3d at 508 (shares tendered to Chase Manhattan Bank). All four circuits to address the issue have thus held that section 546(e) applies to stock transferred in a leveraged buyout even when the transfer is not subject to the systems of guarantees employed by the public securities exchanges. *But see* Pet. at 19 (arguing that 11 U.S.C. § 546(e) should be limited to securities traded in the public securities markets).

a conflict exists between only district courts and/or bankruptcy courts. Pet. at 18. Two of those cases actually involved conflicts among the courts of appeals as well. *Cohen v. de la Cruz*, 523 U.S. 213, 216-17 (1998) (conflict among the Third, Ninth, and Eleventh Circuits); *Dawson Chem. Co. v. Rohm and Haas Co.*, 448 U.S. 176, 185 & n.4 (1980) ("tension" in decisions of Second and Fourth Circuits). The remaining cases were granted certiorari despite the lack of a circuit split because of the importance of the question of federal law at stake. *See Curtis v. Loether*, 415 U.S. 189, 191 (1974) (certiorari granted "[i]n view of the importance of the jury trial issue in the administration and enforcement of Title VIII"); *United States v. Constantine*, 296 U.S. 287, 290 (1935) (certiorari granted because many similar cases were pending and issue required "authoritative settlement of the question"); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981) (certiorari granted because, "[i]n addition to being novel, the punitive damages question is important and appears likely to recur"); *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557 (1990) (certiorari granted to consider important question of criminal law). In contrast to the cases cited by Petitioners, the question presented in this case is an exceedingly narrow issue that does not implicate important constitutional rights or principles of public policy.

Far from warranting this Court's intervention, the decision below faithfully adheres to both the plain text of the statute and the statutory purpose. Although the plain text of the statute does not distinguish between publicly traded securities and

privately traded ones, Petitioners argue that the Sixth Circuit should have read an implicit limitation into the statute excluding privately traded securities from the scope of 546(e), as some district courts and bankruptcy courts have done. Those courts reasoned that such a limitation would reflect congressional intent to protect against instability in the securities market. But, even though the legislative history does not specifically identify privately traded securities as being within the statute's protection, the text of the statute plainly encompasses all securities – including privately traded ones – and "[t]he operation of a law enacted by Congress need not be seconded by a committee report on pain of judicial nullification." *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008); *see also Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546, 568 (2005) (observing that "legislative history is itself often murky, ambiguous, and contradictory" and reliance on legislative history often amounts to little more than "'looking over a crowd and picking out your friends"). Moreover, as the facts of this case demonstrate, unwinding an LBO of privately traded securities can be just as disruptive as unwinding a public LBO. As the Eighth Circuit explained in a case involving a similarly large LBO:

> [P]articularly because so much money is at stake, we question [the] assertion that the reversal of the payments – at least a portion of which were probably reinvested – would in no way impact the nation's financial markets. At the very least, we can see how Congress might have believed undoing similar transactions

> *could* impact those markets, and why Congress might have thought it prudent to extend protection to payments such as these.

Contemporary Indus., 564 F.3d at 987; *accord* Pet. App. 11a ("The value of the privately held securities at issue is substantial and there is no reason to think that unwinding that settlement would have any less of an impact on financial markets than publicly traded securities."). Nothing in the legislative history indicates that applying 11 U.S.C. § 546(e) to privately traded securities would be inconsistent with the statutory purpose or congressional intent. The Sixth and Eighth Circuits correctly held that the statute should not artificially be limited to exclude privately traded securities from the scope of the clear statutory text.

For all these reasons, the disagreement among district courts and bankruptcy courts with respect to the second question presented does not merit this Court's review. No circuit split exists, and other Courts of Appeals are unlikely to disagree with the cogent opinions of the Sixth and Eighth Circuits, which faithfully apply the clear statutory text of 11 U.S.C. § 546(e). Even if this narrow question merited the Court's attention, the Court should not reach out to decide the issue unnecessarily when the Courts of Appeals may well resolve the question themselves. At a minimum, further consideration of the issue at the circuit court level would be beneficial to the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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